

ESTATE OF DONALD PAUL LAFFERTY

IBIA 90-70

Decided November 27, 1990

Appeal from an order after rehearing issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate IP RC 137Z 87-89.

Affirmed.

1. Indian Probate: Witnesses: Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

2. Indian Probate: Appeal: Generally

The burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision.

APPEARANCES: Robert Grey Eagle, Esq., and Pru Hawk, Esq., Pine Ridge, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Ramona Lafferty seeks review of a February 12, 1990, order after rehearing issued by Administrative Law Judge Elmer T. Nitzschke in the estate of Donald Paul Lafferty (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Oglala Sioux OSU-16947, was born on November 3, 1932, and died testate on November 5, 1986. He was survived by eight children, including appellant, and two children of a pre-deceased son. In his will, executed on January 28, 1982, he devised his entire estate to his half-brother, Arthur Lafferty.

Judge Nitzschke held hearings to probate decedent's trust estate on August 27, 1987, and June 14, 1988, at Pine Ridge, South Dakota. Appellant attended the hearings and contested the will on grounds that decedent's chronic alcoholism deprived him of testamentary capacity and that the disposition of property provided for in the will was totally lacking in rational basis. 1/

Judge Nitzschke issued an order approving will on November 3, 1988. Concerning appellant's challenges to the will, he stated:

The evidence presented in support of the contention that decedent suffered from alcoholism was overwhelming. The medical evidence was to the effect that decedent's many years of alcohol abuse cost him his health and ultimately, his life. Testimony by decedent's children made it quite clear that decedent's alcohol abuse adversely affected his ability to maintain marital relationships and in parenting his children. Counsel for [appellant], in support of her position that alcoholism can render a testator mentally incompetent to execute a will, correctly cited for authority the case of Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975). She also correctly pointed out that in the Akers case it was found that in instances of chronic alcoholism, the person approving a will must find that the testator executed the will "during a lucid interval" in order to reject a challenge of mental incompetence.

As was the finding in the Akers case, I find in this instance that the decedent did in fact execute the will here in question during a "lucid interval." Such was the testimony of the Bureau of Indian Affairs employee who assisted the decedent in preparing the will and also serving as a witness to the will. There was no evidence to the effect that on [the] day and time decedent signed his will he was or appeared to be intoxicated or acting other than in a normal fashion. In further support of this finding, it is noted that testimony was to the effect that there were times when decedent refrained from the use of alcohol. * * *

As to the contention that the decedent's act of leaving his property to his half-brother rather than to his children is irrational and therefore a basis for disapproving decedent's will, I find that a rational basis can be found for decedent's act. * * *

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1/ Appellant did not pursue the second contention on appeal.

While it may seem that decedent was being unfair in disinherit his children, I cannot find that such action was without reason and therefore I am without authority to disapprove the decedent's will. Tooahnippah v. Hickel, 397 U.S. 598, 90 S. Ct. 1316 (1970).

Appellant filed a petition for rehearing, alleging error in the Judge's order and offering newly discovered evidence, *i.e.*, testimony of a new witness, Mary Burritt. Judge Nitzschke held a hearing on rehearing on May 12, 1989, and, by order dated February 12, 1990, confirmed the order approving will, stating:

Ms. Burritt's testimony was that on January 28, 1982, the day decedent prepared his will, she saw decedent in the company of his brother, Art Lafferty, sole beneficiary under decedent's will. The time of day was 1:30 P.M. prior to the execution of decedent's will and it was Ms. Burritt's observation that the decedent had been drinking and that in her opinion he was drunk. Mr. Art Lafferty testified that he was not with the decedent on the day in question nor had he seen Ms. Burritt as she stated. Mr. William Brown, the person who prepared the will, again testified that the will was prepared after 1:30 P.M. on the day in question and that the decedent did not appear to have been drinking and that he was in proper condition to make his will.

* * * * *

The rehearing in this matter produced conflicting testimony and did not produce sufficient new evidence to support a conclusion that the decedent was incapacitated or unduly influenced in the making of his will. Because of the conflict in the testimony the demeanor and credibility of the witnesses were factors in the conclusion reached.

The Board received appellant's notice of appeal on April 12, 1990. Only appellant filed a brief.

Discussion and Conclusions

On appeal to the Board, appellant contends that Mary Burritt's testimony was sufficient to support a conclusion that decedent lacked testamentary capacity and was subjected to undue influence. She also contends that the testimony of William Brown, the Bureau of Indian Affairs will scrivener, lacked credibility because it would have been contrary to his own interest to testify other than as he did.

The Board addresses appellant's second contention first. Appellant's theory concerning the credibility of the will scrivener is that he would have jeopardized his employment by admitting that he permitted decedent

to execute a will while intoxicated and therefore, to protect his job, he testified that decedent was not intoxicated. Appellant's theory is sheer speculation. She has produced no evidence whatsoever that the scrivener did in fact act in the manner she postulates. Further, even appellant's theory is flawed. While she hypothesizes a motive for a self-interested scrivener to conceal past errors, she fails to put forth even a conjecture to explain why such a scrivener would have prepared a will for an intoxicated testator in the first instance. Clearly the scrivener in this case had nothing to gain by preparing a will for decedent when decedent was intoxicated. The Board rejects appellant's contention that the will scrivener was not a credible witness.

[1] The testimony of appellant's witness, Mary Burritt, must therefore be weighed against the unimpeached conflicting testimony of the scrivener, as well as that of Arthur Lafferty. Judge Nitzschke, acknowledging the conflict, relied in part on witness demeanor and credibility to reach his decision. When evidence is conflicting, the Board normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor. E.g., Estate of George Neconie, 16 IBIA 120 (1988); Estate of John Walter Few Tails, 13 IBIA 127 (1985).

The Board also considers the fact that the scrivener indisputably observed decedent at the time he executed his will. By contrast, there is at least a possibility that Ms. Burritt was mistaken about the date she saw decedent, given the length of time--7 years--that passed between that date and the date her testimony was given. She testified that decedent told her he intended to execute his will that day, not that he had already executed it. According to the testimony of Donna Deans, a BIA employee, decedent often came into the BIA agency wanting to execute a will, but was turned away because he was intoxicated (Tr. of June 14, 1988, hearing at 15-16). It is possible therefore that Ms. Burritt saw decedent on one of those other occasions. ^{2/} If so, there would be an explanation for the discrepancy between the statements of Ms. Burritt and Arthur Lafferty concerning whether Arthur was with decedent on the day the will was executed.

[2] It is well established that the burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision. Estate of Pauline Muchene Gilbert, 17 IBIA 15 (1988); Estate of George Neconie, supra, and cases cited therein. Appellant has not carried her burden in this case.

^{2/} Although Ms. Burritt testified that she saw decedent on Jan. 28, 1982, neither appellant's attorney nor anyone else at the hearing elicited from her an explanation of how she could remember an exact date after so long a period. The Board must consider the possibility that, unaware of decedent's apparent practice of visiting BIA while intoxicated, with the intention of executing his will, she assumed that the time she saw decedent was the day he actually executed it.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Nitzschke's February 12, 1990, order after rehearing is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge